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IN THE

Supreme Court of the United States

October Term, 1969

No. 871

NORMAN F. DACEY,

Petitioner,

v.

THE FLORIDA BAR, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 22, 1969.

Citation to Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit, printed in Appendix A hereto is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 22, 1969. On October 20, 1969, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to November 21, 1969. The jurisdiction of this Court is invoked under *Title 28 U.S.C. Section 1254 (1).*

Question Presented

Can the Supreme Court of Florida by promulgating an integration rule establish the Florida Bar Association as a state agency enjoying sovereign immunity from tort liability?

Statement

In 1949, the Supreme Court of Florida granted a petition which integrated the Florida bar. Thereafter the Court promulgated the Integration Rule which set forth the powers and responsibilities of the Florida Bar. *32 Florida Statutes Annotated, 497 et seq.* The Florida Bar as part of its regular activities publishes a monthly periodical known as *The Florida Bar Journal.* In the March 1967 edition of *The Florida Bar Journal,* an article written by Boyd H. Anderson alleged that Norman F. Dacey, author of the best-selling book "How to Avoid Probate!", had been convicted in Connecticut of the crime of the unauthorized practice of law. Dacey brought an action for libel in the United States District Court for the Southern

District of Florida against Anderson and the Florida Bar on the basis of diversity of citizenship. *28 U.S.C. §1332.*

The Florida Bar moved to dismiss the complaint on the ground that the Bar was an official arm of the Supreme Court of Florida and was thus immune from tort liability. The trial court granted this motion. On appeal, the Fifth Circuit Court of Appeals held that the Florida Bar was in fact an agency of the State of Florida and thus was not a "citizen" for the purpose of diversity of citizenship under *28 U.S.C. §1332,* thereby denying the Federal Court jurisdiction over the parties to the action and affirming the judgment of the District Court. The Fifth Circuit could not have reached its determination of no diversity of citizenship without having first supported the District Court's contention that the integrated bar of Florida was an organ of government.

Reasons for Granting the Writ of Certiorari

In *Lathrop* v. *Donahue,* 367 U.S. 820 (1961) a sharply divided Court declined to pass directly on the issue of whether an attorney could be compelled to contribute dues to an integrated bar association which supported causes which he personally opposed. The four separate opinions filed in that case reflected the diversity of opinion of the Justices as to the status of an integrated bar. The opinion of the Fifth Circuit below goes to the heart of this question. The effect of the Fifth Circuit's holding that "the Florida Bar is an agency of the State of Florida" is to cloak the Florida Bar with sovereign immunity in all its activities.*

* The Florida Bar argued below and the Petitioner will concede that if the Florida Bar is held to be an arm of the State, then it is entitled to sovereign immunity.

In reaching this conclusion the Fifth Circuit went well beyond the decisions of other courts.

This case presents the novel question of the status of an integrated bar association when its functions come into contact with the lay public-at-large. The question does not extend to the status of a bar association engaged in grievance or unauthorized practice proceedings.

In creating its integrated bar association, the Supreme Court of Florida did not rely upon any provision of the State Constitution nor did it rely upon any enabling legislation, rather the Court based its authority on the inherent power of the judiciary to control and regulate the practice of law within the State. *Petition of Florida State Bar Association*, 134 Fla. 851, 40 So. 2d 902 (1949). Thus, in its opinion, the Court carefully limited its own power to act. The Court determined that the creation of an integrated bar was a desirable step in regulating the activities of lawyers within the State. However, that portion of the Court's Integration Rule which made this newly created bar association an official arm of the sovereign, was totally unnecessary for purposes of controlling the activities of lawyers or would-be lawyers and was not reasonably related to the object sought to be accomplished by the formation of an integrated bar. If the Supreme Court of Florida intended this result, then clearly it acted not only in violation of its limited power to regulate and define the practice of law in the State, but in violation of the due process clause of the Fourteenth Amendment. For due process demands that a law, or the acts of regulatory bodies, such as the Supreme Court of Florida, not be unreasonable, arbitrary and capricious, and that the means selected for carrying

out its functions, shall have a reasonable and substantial relation to the object sought to be obtained. *Nebbia* v. *New York,* 291 U.S. 502 at 525 (1933).

Many states have created integrated bars. The fault is not in the integrated bar *per se,* but in the attempt to elevate the bar association to the status of an arm or alter ego of the state. The Fifth Circuit improperly relied upon the language of the integration rule in passing on the status of the integrated bar. The proper approach is not to look to what a body is called, but what it is and what it does. Judged by any of the standards set forth in the decisions of this Court and of other courts, it is clear that the Florida Bar is not an agency of the State.

A most important consideration in determing whether a body is an agency of the State is the source of the funds from which any judgment against it would be paid. *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459 (1945); *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, 199-200 (1929); *Kansas Turnpike Authority* v. *Abramson,* 275 F.2d 711, 713 (10th Cir.) cert denied, 363 U.S. 813 (1960); *Krisel* v. *Duran;* 258 F. Supp. 845 (S.D.N.Y. 1966). In addition, various courts have considered whether full relief can be obtained from the named defendants without requiring the State to take any affirmative action. *Board of Supervisors* v. *Ludley,* 252 F.2d 372, 376 (5th Cir.) cert. denied, 358 U.S. 819 (1958); whether the agency is performing a governmental or proprietary function, *Kansas Turnpike Authority* v. *Abramson, supra;* and the degree of autonomy of the agency over its ~~option~~ OPERATION, *Krisel* v. *Duran, supra.* It is clear that any recovery in this case would come out of

the funds of the Florida Bar Association and not out of the State Treasury, that the State exercised no control over the publication of *The Florida Bar Journal* and that the Florida Bar was in no way performing a governmental function. Thus, judged by any of these standards, it is apparent that the State of Florida is not the "real party in interest" in this litigation. *State Highway Commission of Wyoming* v. *Utah Construction Co., supra,* at 199.

The conduct of bar associations has been and is being challenged in various courts. (See, e.g., *Dacey* v. *New York County Lawyers Assoc.,* 290 F.Supp. 835 (1968 S.D.N.Y.), 2d Cir. Docket Nos. 33024, 33025, argued October 7, 1969, wherein the District Court held that a non-integrated bar association enjoyed judicial immunity from the damage provision of the Civil Rights Act of 1871.) The outcome of this case will have substantial effect on the course of all pending and future litigation regarding the conduct of bar associations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

November 20, 1969

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27018

NORMAN F. DACEY,

Plaintiff-Appellant

versus

THE FLORIDA BAR, INC., *et al.*,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Florida

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(July 22, 1969)

Before WISDOM and MORGAN, Circuit Judges, and DAVIS,* Judge of the U. S. Court of Claims.

DAVIS, Judge: Some time back, plaintiff-appellant Norman F. Dacey wrote a book called "How to Avoid Probate", which has stirred some flapping of wings in the legal aviary. This work was reviewed by Boyd H. Anderson, Jr., in an issue of the *The Florida Bar Journal,* a monthly publication of defendant-appellee, The Florida Bar (the

* Sitting by designation.

Bar). Considering himself injured by the book-review, Dacey brought this action in the District Court for libel against Anderson and the Bar. The gravamen of the alleged defamation was that the article said, incorrectly, that plaintiff had been convicted in Connecticut of unauthorized practice of law. Jurisdiction in the court below was rested on diversity of citizenship, 28 U.S.C. §1332, Dacey being a Connecticut citizen and the defendants said to be citizens of Florida.

The Bar moved to dismiss on the ground that it was an integral component of the State of Florida, which had not consented to be sued, and was therefore immune from liability for defamation. The district court granted this motion and dismissed the complaint as to the Bar with prejudice. The judge directed that final judgment be entered under F.R.C.P. Rules 54(b) and 58. Dacey has appealed from that final order.[1]

In 1949, the Supreme Court of Florida granted a petition by the then voluntary Florida State Bar Association (and others) that the bar of that State be integrated. *Petition of Florida State Bar Ass'n*, 134 Fla. 851, 40 So.2d 902 (1949). The court held that it had inherent power, under the Florida Constitution, to integrate the bar by rule of court, and that neither an express grant in the Constitution nor an act of the legislature was a prerequisite. After this ruling, the court issued its Integration Rule carrying the holding into effect. 32 Florida Statutes 497. The preamble to this Rule designates the Florida Bar as "a body created by and existing under the authority of this Court"

1. The case continued against Anderson, the other defendant.

and "as an official arm of this Court". All Florida lawyers are required to maintain membership in the Bar and to pay membership fees and dues to it. The members elect the Bar's governing officials. Among its activities the Bar publishes *The Florida Bar Journal;* the Integration Rule expressly contemplates that such a periodical be issued.

The best source for discovering the status of the Integrated Bar vis-à-vis the State of Florida lies in the pronouncements of the Supreme Court of Florida.[2] The 1949 opinion squarely placed the power to establish the integrated bar on the court's inherent authority endowed upon it by the Florida Constitution: "Under our form of government it is the right that each department of government has to execute the powers falling naturally within its orbit when not expressly placed or limited by the existence of a similar power in one of the other departments". 40 So.2d at 905. The Integration Rule declares that the Bar is "a body created by and existing under the authority of this [the Supreme] Court" and is "an official arm of this Court". In 1962, the Supreme Court, on petition of the Bar, specifically ruled that "The Florida Bar, a body created by and existing as an agency of the Judicial branch of government under the constitutional powers of this Court, is a legal entity capable of taking and holding title to real property and of mortgaging and conveying the same". *In the Matter of The Florida Bar* (Case No. 32,132), decided November 21, 1962.[3]

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2. Florida law determines this status. *Louisiana Land & Exploration Co.* v. *State Mineral Board,* 229 F.2d 5, 7 (5 Cir. 1966), *cert. denied,* 351 U.S. 965, 76 S.Ct. 1029, 100 L.Ed. 1485.

3. The Bar desired to build a permanent headquarters building in Tallahassee.

What this adds up to, as we understand it, is a determination by the Florida Supreme Court that the Florida Bar is an integral part of the judicial branch of the government of that state. Plaintiff-appellant insists, however, that this cannot be so. The gist of his argument is that all the Supreme Court did was to transform the pre-existing voluntary Florida State Bar Association into a professional group with compulsory membership, and that the Integrated Bar does not conform to the concept of a state agency as that type of entity is known to the Florida Constitution. In the latter connection, he says that under the former State Constitution (Art. III, Sec. 27) all state officials had either to be elected or appointed by the governor,[4] but that Bar officers are and have been selected by the Bar's membership; that the Bar undertakes activities alien to a state agency, such as publication of the *Journal*[5] and maintenance of a "clients security fund" to reimburse those suffering loss on account of the dishonesty of their lawyers; and that it would be anomalous for a state agency to obtain its funds from membership dues rather than from public revenues.

The cardinal error in plaintiff's position is the failure to recognize that the Florida Supreme Court did not simply endow the old, voluntary Florida State Bar Association with state-granted powers but established a new

4. "The Legislature shall provide for the election by the people or appointment by the Governor of all State and County officers not otherwise provided for by the Constitution and fix by law their duties and compensation."

5. It is worth noting that such undoubted agencies of the Federal Government as the Administrative Office of the United States Courts and the Federal Judicial Center regularly publish news bulletins within their spheres.

entity directly responsible to the court. As we have pointed out, the court's rationale in granting the petition to integrate was that it had inherent authority, under its constitutional powers, to integrate the bar, and its Integration Rule stated it "created" the Bar, a "body" "existing under the authority of this Court", as "an official arm" of the court.[6] The act of creation of a new body or entity was express. There was no direct line of descent from the former non-compulsory professional group.

By the same token, the Florida constitutional provisions, as well as the characteristics of other state agencies, which plaintiff invokes all fail to show that the Bar is something other than an agency of the State. The matters to which plaintiff points relate to agencies of the other branches of the State Government, not to the judicial branch. Under the Florida Constitution, the Supreme Court, as it has held, has inherent power to establish a state institution like the Florida Bar, because bar integration is a "judicial function", and lawyers are not state or county officers[7] but officers of the court "and as such constitute an important part of the judicial system". 40 So. 2d at 906, 907. Similarly, the court held that "the doctrine of implied powers necessarily carries with it the power to impose" a membership fee as a means of defraying the expense of the integrated Bar. 40 So.2d at 906-07. A judgment against the Bar would expend itself against funds which are directly devoted to the purposes of "an official

6. Article 1 of the Rule provides: "The name of the *body created* by this rule shall be THE FLORIDA BAR" (emphasis added).

7. This statement by the Supreme Court was apparently a reference to Section 27, Article III of the former State Constitution, quote *supra* in note 4.

arm'' of the State Supreme Court—plainly a public purpose.[8]

Plaintiff makes some argument that it would be a violation of equal protection for Florida to make the Bar an agency of the State without according the same status to the medical society and other professional associations. One answer, of course, is that the bar of a state has such a close connection to the judiciary—''the law practice is * * * intimately connected with the exercise of judicial power in the administration of justice'', *Petition of Florida State Bar Association, supra,* 40 So.2d at 907—that it is reasonable for Florida to treat it differently from other professions.

Since the Florida Bar is an agency of the State of Florida, it follows that the District Court had no jurisdiction of this suit against it. We need not decide whether the Bar, though an agency of Florida, is suable under state law for a tort. *Cf. Seaboard Air Line R.R.* v. *Sarasota-Fruitville Drainage District,* 255 F.2d 622 (5 Cir. 1958). Even if that is so, there is no jurisdiction on the ground of diversity of citizenship under 28 U.S.C. §1332. A state is not a ''citizen'' for the purposes of that provision (*State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, 199-200, 49 S.Ct. 104, 73 L.Ed. 262 (1929); *De Long Corp.* v. *Oregon State Highway Commission,* 343 F.2d 911 (9 Cir. 1965), *affirming* 233 F.

8. It is not essential in Florida that a state agency obtain its funds from taxes. See *Spangler* v. *Florida State Turnpike Authority,* 106 So. 2d 421, 422 (Fla. 1958), holding that Authority a state agency even though, *inter alia,* "its revenues are derived primarily from tolls charged for the use of the road" and are devoted to a special public purpose, i.e. highway construction and maintenance.

Supp. 7, 10 (D. Ore. 1964)), whether or not the state makes itself suable on the particular claim. *Krisel* v. *Duran,* 386 F.2d 179, 181 (2 Cir. 1967), *cert. denied,* 390 U.S. 1042. In that respect, 28 U.S.C. § 1332 differs from the Eleventh Amendment. *O'Neill* v. *Early,* 208 F.2d 286, 289 (4 Cir. 1953).

The judgment is AFFIRMED.

APPENDIX B

Order Granting Motion to Dismiss of the Florida Bar and Directing Entry of Final Judgment in Favor of the Florida Bar

(R-233)

(Style and Number Omitted) (Filed Sept. 12, 1968)

THIS CAUSE came on before the Court upon the Motion to Dismiss the Amended Complaint As Amended filed by defendant, THE FLORIDA BAR. The Court heard argument of counsel for the respective parties, is fully advised in the premises, and is of the opinion that the motion should be granted with prejudice.

The Court further expressly determines under Rule 54 (b) that there is no just reason for delay in entering a final judgment on the Amended Complaint As Amended in favor of defendant THE FLORIDA BAR and against plaintiff, NORMAN F. DACEY.

Therefore, it is ORDERED AND ADJUDGED

1) The Motion to Dismiss the Amended Complaint As Amended be and the same is hereby granted and the Amended Complaint As Amended and this cause be and the same are hereby dismissed as to the defendant, THE FLORIDA BAR, with prejudice.

2) In accordance with Rule 58, the Clerk of this Court is directed to make entry of a final judgment on the Amended Complaint As Amended in favor of defendant, THE FLORIDA BAR and against the plaintiff, NORMAN F. DACEY.

DONE AND ORDERED at Miami, Florida, this 11th day of September, 1968.

/s/ TED CABOT
United States District Judge

Appendix B

Judgment

(R-235)

(Style and Number Omitted) (Filed September 20, 1968)

This cause came on for hearing before the Court, Honorable TED CABOT, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the final judgment is entered on the Amended Complaint As Amended in favor of the defendant, THE FLORIDA BAR and against the plaintiff, NORMAN F. DACEY.

Dated at Miami, Florida, this 20th day of September, 1968.

JOSEPH I. BOGART, Clerk

By: JUDITH CHIARANDA
Deputy Clerk